NO. 48773-0-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

TROY ALLEN FISHER,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF CLARK COUNTY

The Honorable Barbara Johnson, Judge Pro Tempore

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant Troy Fisher's motion for recusal of the sentencing judge.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the judge pro tem err by denying a motion for recusal where the Court of Appeals reversed an exceptional sentence and remanded for resentencing within the standard range? (Assignment of Error 1)

2. If appellant is not entitled to direct appeal of the denial of the motion to recuse, then should this Court grant discretionary review under RAP 2.3(b)(1) because the basis for the denial constitutes obvious error rendering further proceedings useless? (Assignments of Error 1)

C. STATEMENT OF FACTS AND PRIOR PROCEEDINGS

The state charged Troy Allen Fisher with first degree murder under an allegation that he either acted with premeditated intent to kill his father or he killed him during the course or furtherance of the crime of first degree robbery. *State v. Fisher*, 188 Wn.App. 924, 355 P.3d 1188 (2015). The amended information alleged four aggravating factors: (1) that the defendant committed the offense while armed with a firearm, (2) that the defendant knew or should have known that the victim was particularly vulnerable, (3) that the defendant abused a position of trust or confidence

to that the offense, and (4) that the defendant demonstrated or displayed an egregious lack of remorse in the commission of the offense. The state also charged the defendant with second degree murder in the alternative, alleging that he had intentionally killed his father. *Fisher*, 188 Wn.App. at 926.

Defense counsel moved to suppress statements made to law enforcement. The court heard CrR 3.5/3.6 suppression motions on April 22, 2012, which was denied. On January 3, 2013, Fisher's motion to represent himself was granted, and his trial attorney was "reappointed" as standby counsel. *Fisher*, 188 Wn.App. at 926. On February 27, 2013, standby counsel was permitted to withdraw and the court appointed replacement standby counsel. *Id.* At an omnibus hearing in March, 2013, Fisher moved for additional hearing regarding suppression under CrR 3.5 and 3.6, and the day before trial the parties presented testimony on the reopened CrR 3.5/3.6 motion, after which the court reaffirmed its prior rulings denying the defense motions. On April 22, 2013 a jury waiver filed by Fisher was accepted by the court. *Id.* at 927. The trial was heard by Judge Barbara Johnson and Fisher was found guilty of first degree murder under both charged alternative methods, as well as guilty of second degree murder under the alternative charge. *Id.* at 927-28. The court also

found that the state had proven the firearm enhancement and the aggravating factor that he acted with an egregious lack of remorse in the commission of the offense. The judge court did not find that the state had proven that the defendant committed the offenses by breaching a position of trust and authority and did not find a nexus between the victim's particular vulnerability and the defendant's commission of the offense. *Id.* at 928.

The court imposed an exceptional sentence of 480 months in prison. Report of Proceedings (RP)[1] (7/10/13) at 43. The sentence was based on the top of the standard range of 300 to 380 months (actual standard range of 240 to 320 with 60 months added for the firearm enhancement), and then adding an additional 100 months on the aggravating factor of egregious lack of remorse. RP (7/10/13) at 43; CP 26. Fisher thereafter appealed both the conviction as well as the exceptional sentence.

Fisher argued on appeal, *inter alia*, that substantial evidence does not support the trial court's finding that he acted with an egregious lack of

[1]The record consists of the following court dates: September 20, 2011 (arraignment), July 2, 2013 (motion hearing), July 10, 2013 (first sentencing hearing), July 11, 2013 (continuation of sentencing for presentation of findings and conclusions and Judgment and Sentence), February 22, 2016 (hearing), and March 23, 2016 (re-sentencing). The Verbatim Report of Proceedings is referred to by "RP," followed by the date of the

remorse. By decision published in part on July 14, 2015, this Court affirmed Fisher's conviction. *Fisher*, 188 Wn.App. at 925. However, the Court found that substantial evidence did not support the trial court's finding that he acted with an egregious lack of remorse and therefore the exceptional sentence was not supported by the sole aggravating factor. The Court remanded the case to the Clark County Superior Court and a Mandate was filed November 23, 2015. CP 39.

The case came on for a motion hearing before the Honorable Derek Vanderwood to address appointment of counsel for resentencing and other motions. RP (2/22/16) at 62-71. Counsel was appointed for resentencing and the matter was set for resentencing on March 23, 2016, to permit time for counsel to meet with Fisher and prepare for the hearing. RP (2/22/16) at 69.

Judge Johnson subsequently retired from the bench on March 31, 2015.

Defense counsel filed an Objection and Motion to Recuse Judge Johnson on March 22, 2016. CP 72. The objection stated, *inter alia*, that Judge Johnson should recuse herself on the following grounds: (1) the rulings Judge Johnson made against Fisher during the trial, (2) motions

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relevant hearing and page number.

filed by the defendant that the judge "refused to hear, two suppression motions," (3) the court's alleged refusal to comply with Fisher's requests relating to his motion made pursuant to CrR 7.8, (4) the exceptional sentence, which was subsequently reversed, and (5) a Code of Judicial Conduct complaint made pursuant to CJC 2.5 (A). CP 72-73.

An order appointing former Judge Johnson as judge pro tem was entered March 23, 2016. CP 74. Fisher also filed a pro se "Request to Recuse" on March 23, 2016. CP 77. In it, he stated that he had filed complaint against Judge Johnson and that it constituted a conflict of interest for her to resentence him, and that the court had not ruled on several motions on April 3, 2013, April 15, 2013, and April 22, 2013. He stated that Judge Johnson could not be fair and impartial. CP 77-78.

At the resentencing hearing, defense counsel argued that the case was not "pending" at the time that Judge Johnson retired, and that *State v. Belgarde* was not controlling authority. RP (3/23/16) at 72-73. Counsel stated:

> Our position is that this was not a pending case when [Judge Johnson] retired. The case was done. The conviction was in place. It may have been before the Court of Appeals, but it was not pending. And certainly not pending in the sense that the *Belgarde* case was pending, because that was a reversed conviction that was sent back for a new trial.

RP (3/23/16) at 72.

Counsel also argued that the judge should recuse herself due to examples of bias alleged in the motion filed the previous day. RP (3/23/16) at 72-73; CP 72. The state argued in response that *Belgarde* actually supports the prosecution's position that the case was pending while on appeal, and that the only difference was that in *Belgarde* the entire conviction was overturned rather than the sentence. RP (3/23/16) at 73-74. After hearing argument, Judge Pro Tem Johnson found that under RCW 2.08.180 that case is "pending" in which the court has previously made discretionary rulings. RP (3/23/16) at 74.

Regarding the allegation of actual bias, the judge stated:

> The issues raised by Mr. Fisher in his declaration or—yes, declaration—appear to be issues that did relate to the trial itself. The Court of Appeals addressed quite a lengthy discuss of the case.
>
> A 23-page opinion of the Court of Appeals did address issues that had been raised by Mr. Fisher in his own arguments to the Court of Appeals that raises a number of issue that had been ruled on during the course of the trial, and those were considered and found to be without merit.
>
> I can't tell, specifically, from that whether the issues that Mr. Fisher is raising are the same issues, but he certainly had an opportunity to address those issues to the Court of Appeals if he thought there was some concern about the trial judge

> It's certainly not—it's understandable that an individual who had had rulings made against them and in this case also an exceptional sentence finding, that Mr. Fisher may prefer a different judge. But within the ruling of the court in several opinions, both this opinion that applied to this case and in the *Belgarde* [sic] case, I find no basis for disqualification or prejudice.
>
> RP (3/23/16) at 75-76.

The court imposed a standard range sentence of 380 months in prison. RP (3/23/16) at 98. As the court had previously ordered, the court gave Fisher the top of the standard range of 320 months, with 60 months added for the firearm enhancement. RP (2/23/16) at 98; CP 88.

Timely notice of appeal was filed March 23, 2016. CP 98. This appeal follows.

D. ARGUMENT

1. THE SENTENCING COURT COMMITTED REVERSIBLE ERROR BY DENYING FISHER'S MOTION TO RECUSE.

Preliminarily, it should be noted that a case in superior court may be tried by a judge pro tempore. Washington Const. art. IV, § 7; RCW 2.08.180. Ordinarily, the appointment of a judge pro tempore must be "agreed upon in writing by the parties litigant, or their attorneys of record...." Const. art. IV, § 7; RCW 2.08.180. The requirement that the parties consent to a judge pro tempore is jurisdictional. *State v. Belgarde*,

119 Wn.2d 711, 718, 837 P.2d 599 (1992). A judge pro tempore lacks jurisdiction to preside over a case absent the consent of the parties. *Belgarde,* 119 Wn.2d at 718. However, in 1987, art. IV, § 7 of the state constitution was amended by referendum to include the following language:

> [I]f a previously elected judge of the superior court retires leaving a pending case in which the judge has made discretionary rulings, the judge is entitled to hear the pending case as a judge pro tempore without any written agreement.

Washington Const., art. IV, § 7. RCW 2.08.180 was also amended to reflect this change.

In *Belgarde,* our Supreme Court addressed "the status of a case following an appeal." The *Belgarde* Court held that "when a judgment of a trial court is reversed on appeal and remanded for a new trial ... a party may not disqualify the original trial judge from presiding over the retrial without cause." *Belgarde*, 119 Wn.2d at 715. Although the term "case" is not defined in RCW 2.08.180, in *Belgarde*, the Court noticed that a "case" includes pretrial, trial, post-trial, and appellate proceedings. *Belgarde*, 119 Wn.2d at 716. The Court held in *Belgarde* that a retrial following reversal on appeal was a continuation of the original action and, therefore, is the same case for purposes of RCW 4.12.050. Similarly, in

State v. Clemons, 56 Wn.App. 57, 782 P.2d 219 (1989), Division 1 refused to treat a retrial after a mistrial as a new case, noting that "'case' ... involves pretrial, trial, post-trial and appellate proceedings." *Clemons*, 56 Wn. App. at 59. See also, *State v. Hawkins*, 164 Wn.App. 705, 265 P.3d 185 (2011).

Here, the sentencing does not appear to present "new issues arising from new facts that have occurred since the entry of final judgment," nor was the case dismissed without prejudice and refiled, as was the case in *State v. Torres*, 85 Wn.App. 231, 232--33, 932 P.2d 186, review denied, 132 Wn.2d 1012 (1997). (filing a new information following a dismissal without prejudice was a new case for purposes of RCW 4.12.050).

However, in addition to moving for recusal based on the argument that RCW 2.08.180 does not apply, Fisher also argued that the judge should recuse herself on the basis of bias or appearance of bias. The court's denial of the motion to recuse based on prejudice was an abuse of discretion meriting reversal for sentencing before another judge.

A person accused of a crime has the right to due process of law. Const. art. I, § 3; U.S. Const. amends. 5, 14. An unbiased judge and the appearance of fairness are hallmarks of due process. *In re Murchison*,

349 U.S. 133, 136-38, 55 S. Ct. 623, 99 L. Ed. 942 (1955); *Ward v. Village of Monroeville*, 409 U.S. 57, 59-62, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972); *State v. Cozza*, 71 Wn. App. 252, 255, 858 P.2d 270 (1993). "No judge of a Superior Court of the State of Washington shall sit to hear or try any action or proceeding when it shall be established as hereinafter provided that said judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause." RCW 4.12.040.

The appearance of fairness doctrine provides that "judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned." *Sherman v. State*, 128 Wn.2d 164, 188, 905 P.2d 355 (1995) (citing former Code of Judicial Conduct (CJC) Canon 3(C)). Disqualification of a judge is appropriate "in any proceeding in which the judge's impartiality might reasonably be questioned." Code of Judicial Conduct (CJC) Canon 2, Rule 2.11(A). Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned. CJC Canon 2, Rule 2.11)(A). Recusal lies within the sound discretion of the trial judge, whose decision will not be disturbed absent a clear showing of abuse of that discretion. *In re Marriage of Farr*, 87 Wn.App. 177, 188, 940 P.2d 679 (1997). *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wn.App. 836, 840, 14 P.3d 877 (2000). The court

abuses its discretion only when its decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

In determining whether recusal is warranted, actual prejudice is not the standard. "[A] mere suspicion of partiality" may be enough to warrant recusal because "the effect on the public's confidence in our judicial system can be debilitating." *Sherman*, at 205. The CJC recognizes that where a trial judge's decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence in our judicial system can be debilitating. The CJC provides in relevant part: "Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned...." Former CJC Canon 3(D)(1) (1995). A party need not establish actual prejudice. It is sufficient that an appearance of impropriety exists. *State v. Madry*, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972).

In determining whether a judge's impartiality might reasonably be questioned is an objective test that assumes that " 'a reasonable person knows and understands all the relevant facts.' " The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes that "a reasonable person knows and

understands all the relevant facts." *Sherman* at 206, (quoting *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1313 (2d Cir.1988), cert. denied, 490 U.S. 1102, 109 S.Ct. 2458, 104 L.Ed.2d 1012 (1989)); see also *United States v. Murphy*, 768 F.2d 1518, 1538 (7th Cir.1985), cert. denied, 475 U.S. 1012, 106 S.Ct. 1188, 89 L.Ed.2d 304 (1986).

In this case, Fisher argues that the appearance of fairness doctrine requires recusal by the Judge Pro Tem Johnson because of a series of rulings she made again him at trial, failure to address motions in April, 2013, his assertion that he filed a judicial complaint against her, and her imposition of an exceptional sentence that was subsequently reversed by this Court, all of which shows bias against him. CP 77. Such bias falls within the criteria for disqualification under CJC Canon 2, Rule 2.11(A)(1). However, the court addressed only the issue of actual prejudice and did not evaluate the motion in terms of perceived bias or the appearance of fairness, as required by *Sherman* and its progeny. Here, there were sufficient facts to create the appearance of prejudice: Judge Johnson's prior imposition of an exceptional sentence was reversed by the court of Appeals. Fisher was decidedly unhappy with Judge Johnson and asserted that he filed a judicial complaint against her in his "Request to Recuse" filed March 23, 2016. CP 77. It appears Judge Pro Tem Johnson

failed to recognize the full basis for the motion, and instead assumed he was belatedly arguing about matters that had been addressed on appeal and failed to recognize that Fisher's argument also invoked a challenge to the appearance of fairness and impartiality, which the judge failed to address. It was this erroneous assumption that constitutes reversible error.

To the extent this Court may conclude Fisher is not entitled to review of the denial of his motion to recuse by way of direct appeal, it should still review the issue by way of discretionary review. Discretionary review is warranted because Judge Pro Tem Johnson's denial of the motion constitutes obvious error that rendered further proceedings in the trial court useless. RAP 2.3(b)(1).

A court's failure to comprehend the correct legal rubric under with a matter must be considered constitutes obvious error. *In re Dependency P.P.T.,* 155 Wn. App. 257, 270, 229 P.3d 818, review granted, 170 Wn.2d 1008, 249 P.3d 624 (2010); *Washington State Dept. of Labor and Industries v. Davison* , 126 Wn. App. 730, 736, 109 P.3d 479 (2005). Judge Johnson failed to fully address Fisher's motion to recuse was brought under the appearance of fairness doctrine rather than the showing of actual prejudice.

Judge Johnson's obvious error rendered further proceedings useless. Absent a determination that the judge could be fair and impartial in both actuality and appearance in ruling on Fisher's motions and in imposing a new sentence, the denial of the motion violated Fisher's due process rights. Const. art. I, § 3; U.S. Const. amends. 5, 14; *In re Murchison*, *supra; Ward v. Village of Monroeville, supra; State v. Cozza*, 71 Wn. App. at 255; RCW 4.12.040. Therefore, review is warranted. RAP 2.3(b)(1).

E. CONCLUSION

For the reasons stated, this Court should reverse the trial court's rulings including the sentence imposed and denial of the motion to recuse, and remand for proper consideration of Fisher's motion and resentencing in accordance with the Mandate.

DATED: October 3, 2016.

Respectfully submitted,
THE TILLER LAW FIRM

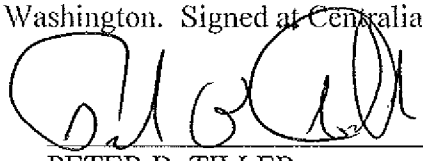
PETER B. TILLER-WSBA 20835
Of Attorneys for Troy Fisher

CERTIFICATE OF SERVICE

The undersigned certifies that on October 3, 2016, that this Appellant's Opening Brief was sent by the JIS link to Mr. David Ponzoha,

Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and a copy was sent by email to Anne Cruser, Clark County Prosecuting Attorney, PO Box 5000, Vancouver, WA 98666-5000, Anne.cruser@clark.wa.gov, a copy was mailed by U.S. mail, postage prepaid, to appellant, Mr. Troy Fisher, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, WA 99362, true and correct copies of this Opening Brief of Appellant.

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on October 3, 2016.



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IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. TROY ALLEN FISHER, Appellant.	COURT OF APPEALS NO. 48773-0-II CLARK COUNTY NO. 11-1-01616-1 CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that one copy of Opening Brief of Appellant was re-mailed to, Troy Fisher, Appellant, by first class mail, postage pre-paid on October 12, 2016 at the Centralia, Washington post office addressed as follows:

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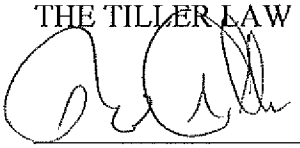

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IN THE COURT OF APPEALS
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STATE OF WASHINGTON, Respondent, vs. TROY ALLEN FISHER, Appellant.	COURT OF APPEALS NO. 48773-0-II CLARK COUNTY NO. 11-1-01616-1 CERTIFICATE OF E-FILING AND MAILING

The undersigned attorney for the Appellant hereby certifies that one copy of Opening Brief of Appellant was re-mailed to, Troy Fisher, Appellant, by first class mail, postage pre-paid on October 12, 2016 at the Centralia, Washington post office addressed as follows:

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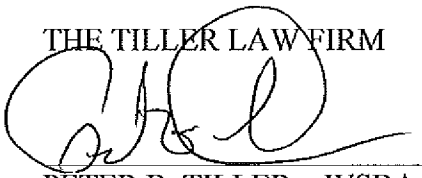

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